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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 602

THEOBALD INDUSTRIES, INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, the Theobald Industries, Inc., a body corporate, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered on October 6, 1953 (R. 24), and motion for rehearing denied on December 1, 1953 (R. 28).

Questions Presented

1. Whether the regulations and the administrative procedure of the Department of Defense, limiting relief for losses under defense contracts to essential contractors, complies with the clear intent of Congress, as expressed by the Senate Committee on Government Operations.

2. Whether the regulations and administrative procedure

under said Act by the Department is subject to judicial review.

Statement

Petitioner accepted contracts with the Department of the Army in June, 1951, for fats, grease and bones for use in the manufacture of tallow, at fixed prices. At that time the price of tallow was firm, and the ceiling price was 15½ cents per pound. Petitioner had every reason to expect such prices to continue. But due to economic conditions beyond its control and the reduction in the ceiling price to 10½ cents per pound of tallow, the market price of tallow became so depressed that petitioner suffered heavy losses, and for a great part of the contract period, it was required to pay about 85% more for the waste material than it received for the finished product.

Petitioner filed a claim for such losses under Title II of the First War Powers Act, as amended. 55 Stat. 839[1] The amendments are shown in the Appendix . The Department of the Army denied petitioner's claim, and suit for review was filed in the Court below. Petitioner's suit requested judicial review of the regulations of the Department upon the ground that such regulations and the administration of the Act did not comply with the intent of Congress.

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[1] Title II of the First War Powers Act provides:

> The President may authorize any department or agency of the government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war. . . .

The amendments and extension of the Act substituted "national defense" for "prosecution of the war." See Appendix 8.

The Holding of the Court Below

The Court of Claims held that the regulations and the administration of the Act by the Department were matters within their discretion and not reviewable by the Court, and, granting the motion for summary judgment, dismissed the petition.

Reasons for the Allowance of the Writ

The Senate Committee on Government Operations, which considered and reported on the bill for the extension of such legislation criticized the regulations of the Department of Defense and its administration of the Act.[2] The Committee stated that Congress intended the Act to afford relief to fixed-price contractors suffering losses, regardless of whether they were essential. The regulations, on the con-

[2] The Senate Committee on Government Operations, in its Report No. 1498, 82nd Congress, 2d Session, reporting on S. Bill 2421, made the following conclusions:

> "In reporting S. 2421 favorably, the committee wishes to emphasize that the extension of the broad powers contained in Title II of the First War Powers Act for another year is not to be construed as an endorsement of a permanent or continuing Government policy. The extension is approved for a limited period only to allow the Department of Defense to modify defense contracts during the extraordinary economic conditions presently existing.
>
> "The committee also desires to reaffirm the intent of Congress in enacting title II of the First War Powers Act. The legislative history of Public Law 921 of the Eighty-first Congress, which statute extended title II until June 30, 1952, indicates clearly that Congress sought to achieve two primary objectives: (1) To protect military sources of supply by keeping defense suppliers in business, and (2) to afford relief to businesses incurring heavy losses on fixed-price contracts."

Then, the Report goes on to say:

> "It is the conviction of the Committee on Government Operations that where a defense contractor has suffered extreme financial hardship due to rising costs, material shortages, or other economic factors beyond his control, and not within his contemplation at the time he accepted a fixed-price contract, such a contractor should be entitled to the relief the Congress intended title II to afford."

(See Appendix 7.)

trary, provided for relief from losses only to those whose productive ability "is essential to the national defense."[3]

The Court below has passed upon important questions involving the administration of Title II of the First War Powers Act, as amended. This is a case of first impression in so far as this phase of the Act is concerned. The Act committed the right to modify contracts when it was deemed that such modification would facilitate the national defense. The regulations and the administration of the Act, limiting the word "facilitate" to "essential" is clearly contrary to the intent of Congress in its original enactment and in the amendments and extensions, as stated by the Senate Committee. See *Duplex Printing Co.* v. *Deering,* 245 U. S. 443, 474, 475, and *Binns* v. *United States,* 194 U. S. 486, 495.

Conclusion

The Court below has refused to review the regulations and the administration of the Act, which the Senate Committee stated was in direct conflict with the intent of Congress. It is respectfully submitted that this is a case calling for the exercise of the supervisory powers of this Court in order that the question may be settled, and to that end a writ of certiorari should be granted and this Court should review the decision of the Court below and reverse it.

JOSEPHUS C. TRIMBLE,
Counsel for Petitioner.

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Of Counsel.

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[3] The regulations contained the following:

"Where an actual or threatened loss on a defense contract, however caused, will impair the productive ability of a contractor whose continued operation as a source of supply *is found to be essential* to the national defense, the contract will generally be equitably adjusted to the extent necessary to avoid such impairment of the contractor's productive ability." (Emphasis ours.) 32 CFR Secs. 438.1-438.5.

APPENDIX "A"

Senate Report Number 1,498, Eighty-second Congress, Second Session—"Amending the Act of January 12th, 1951 (64 Stat. 1257), Amending and Extending Title II of the First War Powers Act, 1941.

Calendar No. 1426

Senate

82d Congress 2d Session

Report No. 1498

Amending the Act of January 12, 1951 (64 Stat. 1257), Amending and Extending Title II of the First War Powers Act, 1941

May 1, 1952—Ordered to be printed

Mr. Moody, from the Committee on Government Operations, submitted the following

Report

[To accompany S. 2421]

Conclusion

In reporting S. 2421 favorably, the committee wishes to emphasize that the extension of the broad powers contained in title II of the First War Powers Act for another year is not to be construed as an endorsement of a permanent or continuing Government policy. The extension is approved for a limited period only to allow the Department of Defense to modify defense contracts during the extraordinary economic conditions presently existing.

The committee also desires to reaffirm the intent of the Congress in enacting title II of the First War Powers Act. The legislative history of Public Law 921 of the Eighty-first Congress, which statute extended title II until June 30, 1952, indicates clearly that the Congress sought to achieve

two primary objectives: (1) To protect military sources of supply by keeping defense suppliers in business, and (2) to afford relief to businesses incurring heavy losses on fixed-price contracts.

It is the committee's conviction that the application of the statute by the Department of Defense should give proper consideration to each of these objectives with sufficient attention to the financial distress suffered by individual contractors because of economic circumstances beyond their power to either anticipate or control.

Testimony presented to the Select Committee on Small Business of the United States Senate, which conducted hearings on the administration of Public Law 921 of the Eighty-first Congress, indicated strongly that injustices to various businesses had resulted from the Department of Defense's administration of the statute during 1951 and 1952. In its report (S. Rept. No. 1459), the Small Business Committee states:

The military has applied the law to meet the first of these objectives involving its own problems [to protect sources of supply] but with a stubborn disregard of practical justice has refused to meet the second [to afford relief in hardship cases].

After reviewing a score of complaints, the Small Business Committee came to the conclusion that the Department of Defense had so rigidly interpreted the authority to afford relief to hardship cases that the actual intent of title II had been all but emasculated by the restrictive regulations issued by the Department.

The regulations required that a contractor be essential to the national defense before he could qualify for relief. The Small Business Committee pointed out that title II as well as the implementing Executive order required merely that the granting of relief would facilitate the national defense and observed that the test contained in the Department of Defense regulations made it virtually impossible for a contractor to qualify for relief unless he was a sole supplier or one of a very few suppliers, regardless of the hardship he may have suffered under a fixed-price

contract. The Small Business Committee thereupon recommended a change in the Department of Defense regulations.

The Committee on Government Operations endorses the conclusions contained in the report of the Small Business Committee on the administration of Public Law 921, Eighty-first Congress. It is the conviction of the Committee on Government Operations that where a defense contractor has suffered extreme financial hardship due to rising costs, material shortages, or other economic factors beyond his control, and not within his contemplation at the time he accepted a fixed-price contract, such a contractor should be entitled to the relief the Congress intended title II to afford.

The Committee on Government Operations in approving extension of title II by no means suggests that the Department of Defense afford relief to every contractor who suffers financial loss on a contract, and reiterates its position as set forth in Senate Report 2686 that the main objective of the legislation is "not to prevent losses on Government contracts because of increased costs, except in extreme hardship cases." It is the view of this committee, however, that the present policy of the Department of Defense should be broadened so that proper consideration may be given to the defense contractor, or subcontractor, who, because of economic factors completely beyond his control, faces severe financial hardship or bankruptcy, as was intended under the original act.

The committee therefore recommends the enactment of S. 2421, which extends this contract modification authority to June 30, 1953.

APPENDIX "B"

Public Law 921, Chapter 1230, Eighty-First Congress, Second Session

[S. 4266]

An Act

To amend and extend title II of the First War Powers Act, 1941

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That section 201 of the First War Powers Act, 1941 (55 Stat. 838) is hereby amended by striking out the words "the prosecution of the war effort" and the words "the prosecution of the war", appearing in such section, and inserting in lieu of each stricken provision the words "the national defense"; and such section 201 is further amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "*Provided further*, That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

SEC. 3. Nothing in this Act shall prejudice anything heretofore done under the said title II of the First War Powers Act, 1941, or the continuance in force of any action heretofore taken thereunder.

Approved January 12, 1951.

APPENDIX "C"

Public Law 426, Chapter 524, Eighty-second Congress, Second Session

S. 2421

An Act

All 66 Stat. 295.

To amend the Act of January 12, 1951 (64 Stat. 1257), amending and extending title II of the First War Powers Act, 1941.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act of January 12, 1951 (64 Stat. 1257), is hereby amended by striking out "1952" and inserting in lieu thereof "1953".

50 U.S.C. app. § 611 note.

Approved June 30, 1952.